

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

1125 Atlantic Avenue - Third Floor

Atlantic City, NJ 08401

(609) 344-3161

File No. 51154.22

Attorney for Defendant, Marina District Development Company, LLC d/b/a Borgata Hotel
Casino & Spa

JOHAN DANIYAN,

: NO. 07-cv-02734 (JHR)(JS)

Plaintiff :

vs. :

Civil Action

BORGATA HOTEL CASINO,

: **PROPOSED PRELIMINARY**
: **JURY CHARGES**

Defendant. :

UNITED STATES DISTRICT COURT, MODEL CIVIL JURY INSTRUCTIONS:

- 1.1 Introduction; Role of Jury
- 1.2 Description of case; Summary of Applicable Law
- 1.3 Conduct of Jury
- 1.4 Bench Conferences
- 1.5 Evidence
- 1.6 Direct and Circumstantial Evidence
- 1.7 Credibility of Witnesses
- 1.8 Jury Questions for Witnesses (Option 2)
- 1.9 Note-Taking By Jurors.
- 1.10 Preponderance of the Evidence

- 1.12 Description of Trial Proceedings
- 2.1 Impeachment of Witness' Character for Truthfulness
- 2.2 Judicial Notice
- 2.3 Stipulation of Testimony
- 2.4 Stipulation of Fact
- 2.5 Use of Deposition
- 2.6 Use of Interrogatories
- 2.7 Charts and Summaries
- 2.8 Charts and Summaries Not Admitted in Evidence
- 2.9 Striking Evidence
- 2.10 Evidence Admitted for a Limited Purpose
- 2.11 Opinion Testimony
- 2.14 Recess Admonition
- 3.1 Deliberations
- 3.2 Number of Witnesses
- 3.3 Read-Backs of Trial Testimony
- 3.4 Deadlock
- 9.0 ADA Employment Claims – Introductory Instructions
- 9.1.2 Elements of an ADA Claim – Disparate Treatment-Pretext
- 9.1.3 Elements of an ADA Claim – Reasonable Accommodation
- 9.1.7 Elements of an ADA Claim – Retaliation
- 9.2.1 ADA Definitions – Disability
- 9.2.2 ADA Definitions – Qualified Individual

9.4.1 ADA Damages – Compensatory Damages – General Instruction

9.4.2 ADA Damages – Punitive Damages

NEW JERSEY SUPERIOR COURT, MODEL CIVIL JURY CHARGES:

1.11 Cell Phone, Pager And Other Wireless Communication Devices

1.12(A) Purpose Of Charge

1.12(B) Role Of The Judge

1.12(C) Role Of The Attorneys

1.12(D) Role Of The Jury

1.12(M) False In One – False In All

1.12(P) No Prejudice, Passion, Bias Or Sympathy

1.21(DD) Receiving The Verdict

1.21(EE) Thanking And Discharging The Jury

1.13 Expert Testimony

1.13(A) Optional Charge Concerning Hypothetical Questions

1.13(B) Optional Charge In Case Of Conflicting Expert Testimony

2.21(A) The New Jersey Law Against Discrimination, General Charges

2.21(B)(4) *Prima Facie* Elements To Be Included In Charge If Disputed In A Particular Case, Discriminatory Treatment in Compensation, Terms, Conditions Or Privileges Of Employment

2.21(B)(5) *Prima Facie* Elements To Be Included In Charge If Disputed In A Particular Case, Discriminatory Discharge Or Demotion

2.33(A) Employment Discrimination Mitigation Of Economic Damages, General Mitigation Principals

- 2.33(B) Employment Discrimination Mitigation Of Economic Damages, Lowered Sights Doctrine
- 8.61 Punitive Damages — Law Against Discrimination Claims
- Proposed Charge - Worker's Compensation – Retaliation - see attached

Business Judgment Charge. Plaintiff alleges that he was terminated because of his disability and worker compensation claims. The Borgata has produced evidence that plaintiff was terminated because his work performance did not meet the requirements of the position during his probationary period. It is not the function of this court or this jury to attempt to second guess the business decisions made by the Borgata, absent evidence of impermissible motives, in this case alleged handicap and worker compensation discrimination. While an employer's judgment or course of action may seem erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for the alleged illegal discrimination. Said another way, whether you agree or disagree with the Borgata's decision to terminate plaintiff because of job performance is not the issue in this case. The issue is whether the plaintiff has proven by a preponderance of the credible evidence that his termination constituted unlawful handicap discrimination in violation of the New Jersey Law Against Discrimination and retaliation in violation of the Worker's Compensation Act. (*Ezwold v. Wolf Block Schorr and Solis-Cohen*, 983 F.2d. 509 (3d. Cir. 1992).

Unlawful Discrimination Charge. "The LAD prevents only unlawful discrimination against disabled individuals; it does not prevent the termination or change of employment of any person who 'is unable to perform adequately the duties of employment, nor [does it] preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standards.' Put another way, the LAD acknowledges the authority of employers to manage their own business." *Viscik v. Fowler Equipment Co., Inc.*, 173 N.J. 1, 13 (2002).

Unknown Disability Charge. "[D]isabilities are often unknown to the employer, and because of that, the plaintiff must demonstrate that the defendant employer knew of the disability to state a prima facie case of unlawful discrimination." *Geraci v. Moody-Tottrup, International, Inc.*, 82 F.3d 578, 581 (1996); and, *Illingworth v. Nestle U.S.A., Inc.*, 926 F. Supp. 482, 484 (D.N.J. 1996).

You may not "presume that an employer most likely practiced unlawful discrimination when it did not know that the plaintiff even belonged to the protected class. The employer's knowledge, in this ... case[], is a critical element of the plaintiff's prima facie case." *Geraci v. Moody-Tottrup, International, Inc.*, 82 F.3d 578, 581 (1996). *Illingworth v. Nestle U.S.A., Inc.*, 926 F. Supp. 482, 484 (D.N.J. 1996).

“Absent such knowledge, the prima facie case fails and the employer cannot, as a matter of law, be liable for handicap discrimination.” Illingworth v. Nestle U.S.A., Inc., 926 F. Supp. 482, 484 (D.N.J. 1996).

Unclean Hands. “Unclean hands” consists of an “evil practice or wrong conduct in a particular matter or transaction in respect to which judicial protection or redress is sought.” Untermann v. Untermann, 19 N.J. 507, 517; 117 A.2d 599 (1955).

By: 

NANCY A. VALENTINO, ESQUIRE
Attorney for Defendant, Marina
District Development Company,
LLC d/b/a Borgata Hotel Casino & Spa

Dated: JANUARY 3, 2011

CLAC: 507745.1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

1125 Atlantic Avenue - Third Floor

Atlantic City, NJ 08401

(609) 344-3161

File No. 51154.22

Attorney for Defendant, Marina District Development Company, LLC d/b/a Borgata Hotel
Casino & Spa

JOHAN DANIYAN,

: NO. 07-cv-02734 (JHR)(JS)

Plaintiff :

vs. :

Civil Action

BORGATA HOTEL CASINO,

Defendant. :

**PROPOSED PRELIMINARY
JURY CHARGE
WORKMENS' COMPENSATION
RETALIATION**

In this case Mr. Daniyan claims that Borgata retaliated against him for filing a workmens' compensation claim. New Jersey law provides that an employer may not retaliate against an employee for making or attempting to make a claim for workmens' compensation.

To prevail on this claim, Mr. Daniyan must prove all of the following by a preponderance of the evidence:

First: Mr. Daniyan must prove that he made or attempted to make a claim for workmens' compensation.

Second: Mr. Daniyan must prove that he was retaliated against for making that claim.

Galante v. Sandoz, Inc., 192 N.J. Super 403. 4192 N.J. Super 403, 407; 470 A.2d 45 (LawDiv. 1983)

Timing alone cannot establish that an employee was retaliated against for filing a workmens' compensation claim. *Morris v. Siemens Components, Inc.*, 908 F.Supp. 486, 493 (D.N.J. 1996)

By: 

NANCY A. VALENTINO, ESQUIRE
Attorney for Defendant, Marina
District Development Company,
LLC d/b/a Borgata Hotel Casino & Spa

Dated: JANUARY 3, 2011

CLAC: 510767.1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.
1125 Atlantic Avenue - Third Floor
Atlantic City, NJ 08401
(609) 344-3161
File No. 51154.22
Attorney for Defendant, Marina District Development Company, LLC d/b/a Borgata Hotel
Casino & Spa

JOHAN DANIYAN,

: NO. 07-cv-02734 (JHR)(JS)

Plaintiff :

vs. :

Civil Action

BORGATA HOTEL CASINO,

**DEFENDANT – BORGATA'S
WITNESS LIST**

Defendant. :

WITNESSES

Rocco Nicosia, Borgata
Mira Zaras, Borgata
Karen Brundage-Johnson, Borgata
Ray Gronau, Borgata
Harry Flores, Borgata
Alexander Macchione, Borgata
Sandra Becker, Borgata
Victor Vega, Borgata
L. Thomas, Medical One
Arlene Arcara, Medical One
Sherri Langsdorf, Medical One
Susan Haggerty Guld
Jim Shimp, NovaCare
Dr. Glenn Zuck, Pace Orthopedics
Nancy Lorraine
Ezzat Hanna

By: 

NANCY A. VALENTINO, ESQUIRE
Attorney for Defendant, Marina
District Development Company,
LLC d/b/a Borgata Hotel Casino & Spa

Dated: JANUARY 3, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A.

1125 Atlantic Avenue - 3rd Floor

Atlantic City, NJ 08401

(609) 344-3161

File No. 51154.22

Attorney for Defendant, Marina District Development Company, LLC d/b/a Borgata Hotel
Casino & Spa

JOHAN DANIYAN,

: NO. 07-cv-02734 (JHR)(JS)

:
Plaintiff :

vs.

: Civil Action

BORGATA HOTEL CASINO,

:
Defendant. :

:
**DEFENDANT'S
EXHIBIT LIST**

Defendant's Exhibits

1. Defendant intends to introduce the following exhibits into evidence;

No.	Description	Date	Bates No
D-1	Plaintiff's Offer letter	4/5/2005	1
D-2	Guest Room Attendant Job Description	4/5/2005	2
D-3	Employment Inquiry Release	4/11/2005	11
D-4	Plaintiff's Employment Application	4/5/2005	14-15
D-5	Electronic Employment Status	6/22/2005	16
D-6	Plaintiff's Discipline – Verbal Coaching	5/15/2005	21-22
D-7	Plaintiff's Discipline – Written Warning	5/21/2006	23
D-8	Plaintiff's Discipline – Final Written Warning	6/9/2005	24-25
D-9	Plaintiff's Discipline – Suspension	6/17/2005	26
D-10	Plaintiff's Discipline – Termination	6/20/2006	27
D-11	E-mails from Mira Zaras and Susan Guld	6/23/2005	28
D-12	E-mail from Mira Zaras	6/12/2005	29
D-13	Incident Report	6/11/2005	30-33
D-14	E-mails from Mira Zaras	6/24/2009	35
D-15	Plaintiff's Borgata Medical Pass	5/7/2005	39
D-16	Plaintiff's Borgata Medical Pass	5/8/2005	40
D-17	Policies and Procedures Review	4/21/2005	43

	Acknowledgement		
D-18	Policy and Procedures Review Acknowledgment	4/21/2005	44
D-19	Applicant Information Interview Sheet	3/19/2005	45
D-20	Applicant Data Sheet	3/14/2005	46-47
D-21	Electronic Application	3/14/2005	48-53
D-22	Associate Recorded Events	7/4/2007	54-55
D-23	Borgata Equal Employment Policy	7/3/2003	96-100
D-24	Borgata Hiring Process	7/3/2003	101-103
D-25	Borgata Introductory Period	7/3/2003	104-105
D-26	Borgata Talent Relations Policy	7/3/2003	106-107
D-27	Borgata Associate Assistance Program	7/3/2003	109-111
D-28	Borgata Employment Applications Policy	7/3/2003	112
D-29	Borgata Conduct and Work Rules Policy	7/3/2003	113-125
D-30	Borgata Investigations Policy	7/3/2003	126-134
D-31	Borgata Coaching and Progressive Discipline Policy	7/3/2003	135-143
D-32	Memo re: Equal Opportunity	4/18/2005	149
D-33	Plaintiff's Borgata W-2 Status	2005	204
D-34	Collective Bargaining Agreement Local 54	12/23/2003	207-217
D-35	Borgata Drug and Alcohol Use and Testing Policy	7/3/2003	218-226
D-36	E-mails to and from Susan Guld	7/23/2005	228-229
D-37	Disciplinary Action Electronic Print Screen	6/20/2005	246-248
D-38	Disciplinary Action Electronic Print Screen	6/17/2005	249
D-39	Disciplinary Action Electronic Print Screen	6/9/2005	250
D-40	Disciplinary Action Electronic Print Screen	6/5/2005	251
D-41	Disciplinary Action Electronic Print Screen	5/21/2005	252
D-42	Disciplinary Action Electronic Print Screen	5/15/2005	253
D-43	Borgata Drug Screening Consent Form	4/5/2005	261
D-44	E-mails from Susan Guld and Mira Zaras	6/14/2005	271
D-45	Handwritten Notes re: Plaintiff's failure to submit documentation and return to full duty status	6/11/2005	272
D-46	Radiology Report – Lumbar spine	6/14/2005	287
D-47	Radiology Report – CT Lumbar	6/14/2005	288
D-48	Atlantic City Medical Center Medical Clearance	6/11/2005	290
D-49	PACE Patient Instruction Form	6/14/2005	291
D-50	Memo from Susan Guld regarding suspension pending receipt of medical paperwork	6/17/2005	293
D-51	Medical Unit Notes	6/17/2006	294
D-52	Chronology of Events	6/17/2005	295-296
D-53	Physical Therapy Request – leave work	6/17/2005	297

	early to attend		
D-54	Medical Unit Notes	6/17/2005	298-299
D-55	Physical Therapy Request	6/15/2005	300
D-56	Borgata Medical Pass	6/16/2005	301
D-57	Medical Unit Notes	6/15/2005	302-303
D-58	Letter from Dr. Glenn Zuck of PACE Orthopedics	6/14/2005	307-308
D-59	Drug Prescriptions	6/14/2005	312-313
D-60	Borgata Medical Pass	6/14/2005	314
D-61	Authorization to Brigantine Taxi Service	6/14/2005	315
D-62	Medical Unit Notes	6/13/2005	316-318
D-63	Borgata Consent for Drug Testing	6/13/2005	320
D-64	Borgata Associate Illness Form	6/13/2005	321-322
D-65	Medical One Worker's Compensation Report	6/11/2005	323
D-66	Borgata Supervisor's Report of Associate Illness/Injury	6/11/2005	327
D-67	Worker's Compensation First Report of Injury or Illness	6/15/2005	337
D-68	Drug Test Log	5/23/2005	361-376
D-69	Discipline/Termination – Janet Schroeder	11/7/2005	598-599
D-70	Discipline/Termination – Stacy Brunetti	9/22/2005	600-601
D-71	Discipline/Termination – Felicia C. Croker	12/8/2005	602-603
D-72	Discipline/Termination – Mychael Branch	12/8/2005	606-607
D-73	Discipline/Termination – Yana Yordanova	8/29/2005	608-609
D-74	Discipline/Termination – Bambi L. Blount	11/1/2005	612-613
D-75	Discipline/Termination – Florinda Palaez de Munoz	10/7/2005	614-615
D-76	Discipline/Termination – Eli Stoyanova	8/11/2005	620-621
D-77	Discipline/Termination – Yovani I. Nozario	7/10/2005	632-633
D-78	Discipline/Termination – Jerusalem Tewoldeberhan	9/3/2005	634-635
D-79	Discipline/Termination – Carol I. Smith	12/10/2005	636-637
D-80	Discipline/Termination – Tauheed M. Shamsiddeen	4/24/2005	668-669
D-81	Discipline/Termination – Holly A. Smith	12/15/2005	670-671
D-82	Discipline/Termination – Mia A. Jones	1/3/2005	698-699
D-83	Discipline/Termination – Esperenza Mejia	3/21/2005	720-721
D-84	Discipline/Termination – Khalif S. Davis	4/3/2005	727-728
D-85	Discipline/Termination – Socorro Perez	9/1/2005	732-733
D-86	Discipline/Termination – Tatiana Bazhenova	8/17/2005	738-739
D-87	Discipline/Termination – Agustin F. Nunez	11/13/2005	742-743
D-88	Discipline/Termination – Iman C. White	12/25/2005	746-747

D-89	Discipline/Termination – Jaime S. Reid	1/3/2005	756-757
D-90	Discipline/Termination – Maria D. Gomez	5/21/2005	758-759
D-91	Discipline/Termination – Sylvia E. Gonazalez	10/23/2005	762-763
D-92	Discipline/Termination – Kumud Amin	4/28/2005	768-769
D-93	Discipline/Termination – Melvin C. Timberlake, Jr.	4/6/2005	782-783
D-94	Discipline/Termination – Elena Tarasova	9/7/2005	790-791
D-95	Discipline/Termination – Johan E. Daniyan	6/20/2005	792-793
D-96	2005 Report of GRA's Issued Discipline		1994-2016
D-97	Borgata Worker's Compensation Medical Pass and Modified Duty Policy	7/3/2003	2017-2029
D-98	Borgata Employment Applications Policy	7/3/2003	2030
D-99	Plaintiff's Acknowledgement of Housekeeping Policies and Procedures Review	4/21/2005	2031
D-100	Job Description for Housekeeping Heavy Porter	5/27/2003	2131
D-101	Housekeeping Key Control Procedure	7/2003	2140
D-102	Plaintiff's Tropicana Personnel File	5/19/08	

By: 

NANCY A. VALENTINO, ESQUIRE
Attorney for Defendant, Marina
District Development Company,
LLC d/b/a Borgata Hotel Casino & Spa

Dated: JANUARY 3, 2011

CLAC; 511243.1